

Minutes

**WARRICK COUNTY AREA BOARD OF ZONING APPEALS**

Regular meeting t held in Commissioners Meeting Room,  
Third Floor, Historic Court House,  
Boonville, IN

Monday, October 24, 2011, 6:00 PM

A moment of silence was held followed by the Pledge of Allegiance.

**MEMBERS PRESENT:** Larry Willis, Chairman, Tina Baxter, Terry Dayvolt, Scott Dowers, Don Mottley, Mike Winge and Judy Writsel.

Also present were Morrie Doll, Attorney, Sherri Rector, Executive Director and Sheila Lacer, Staff.

**MEMBERS ABSENT:** None

**MINUTES:** Upon a motion by Don Mottley and seconded by Judy Writsel, the Minutes of the last regular meeting held September 26, 2011, were approved as circulated.

The Chairman explained the Rules of Procedure.

**SPECIAL USES:**

**BZA-SU-11-19**

**APPLICANT:** Lamar Outdoor Advertising by S. Carter Clarke, VPGM

**OWNER:** Marcus O. and Janice E. Miller

**PREMISES:** Property located on the S side of SR 66 approximately 0 feet E of the intersection formed by SR 66 and Triple Crown Dr. Lt. 79 in Triple Crown Estates Subdivision. Ohio Twp. 8711 SR 66.

**NATURE OF CASE:** Applicant requests a Special Use (SU-8) from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow an electronic message board on the west face only of an existing standard billboard in a "C-1" Neighborhood Commercial Zoning District. *Advertised in the Boonville Standard September 15, 2011. Continued from September 26, 2011, meeting. Request to continue to November 28, 2011.*

Mrs. Rector stated they have asked this application to be continued to the November meeting. She stated they have filed for a rezoning of this property and the notices have been sent out. She stated they are attempting to rezone the property to "C-3" with a Use and Development Commitment limiting it to the real estate office and the billboard.

Mike Winge made a motion to continue BZA-SU-11-19 to the November 28, 2011, meeting. The motion was seconded by Terry Dayvolt and unanimously carried.

**BZA-SU-11-23**

**APPLICANT and OWNER:** Ubelhor Homes., Inc. by Daniel Ubelhor, Pres.

**PREMISES:** Property located on the W side of SR 66 approximately 600 feet NW of the intersection formed by SR 66 and Sharon Rd. Ohio Twp. 7241 SR 66.

**NATURE OF CASE:** Applicant requests a Special Use (SU-23) from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow self-storage warehouse facilities with outside storage in a (proposed) “C-4” General Commercial Zoning District. *Advertised in the Boonville Standard October 13, 2011.*

Danny Ubelhor and Jim Morley, Jr. were present.

Larry Willis excused himself from the meeting due to a conflict of interest.

The Vice Chairman called for a staff report.

Mrs. Rector stated they have submitted all of the return receipts from certified mail of notice of this meeting to the adjacent property owners. She stated they have also filed a rezoning petition on this property and both notices were mailed in the same envelope. She stated this application is for an SU 23 for self storage warehouse facilities with outside storage. Mrs. Rector stated the property to the north is “R-3” – Newburgh Heights Apartments; South – “C-3” – Vacant and then to the SE (not touching subject property) is “R-2” Sharon Woods Apts.; East – “C-3” – Vacant; West – “A” – residence and then some “R-1A” to the NE that is vacant. She stated there is no flood plain on the property. She stated there is an existing entrance off SR 66 and INDOT is reviewing the entrance to determine if anything additional will be required. She stated she did receive an email from them and they have notified Mr. Ubelhor of four items that need to be taken care of for approval of the entrance and they will have to bond it and so a condition upon this Special Use could be that the driveway permit must be bonded before issuing the Improvement Location Permit for the buildings. Mrs. Rector added this property was rezoned to M-2 in 2003 for the concrete batch plant by Kenny Ubelhor. She said at that meeting Mr. Ubelhor promised the Board that he would rezone the property back to the C-4 zoning once the batch plant was no longer needed and he also entered into a private covenant with the County and surrounding property owners stating once the batch plant was no longer necessary he would rezone the property back to C-4 which he has done. She stated if they could have left the property zoned “M-2”, they would not have needed to file this Special Use because it would be a permitted use in that zoning. She said the Commissioners approved the rezoning today. Mrs. Rector added they are showing the traffic flow to be one direction in and out with “No Access” behind the buildings and they have answered the proposed use statements in the application and it is in order.

Jim Morley, Jr. stated business is good for Storage Master and they are running out of space at the Bell Road site and in combination with that, the majority of new subdivisions don’t allow for outside storage of RV’s or boats or camping trailers or anything like that so there is a need for additional spaces to store boats and that kind of thing. He stated this seems to be a good location and it was previously a concrete batch plant so this is by far a much lighter use.

Terry Dayvolt asked if the access will be the same as what is there now.

Jim Morley stated it is and added in his preliminary discussion with Richard Meyer with INDOT, they may want an upgrade of that entrance with a different radius on either side but it will be the same location and will be a right in/right out because he believes that is a divided highway.

Ascertaining there were no other questions from the Board and being no remonstrators present, the Vice Chairman called for a motion.

Terry Dayvolt made a motion finding of fact be made as follows from the testimony and proposed use statement:

1. The USE is deemed essential or desirable to the public convenience or welfare.
2. The USE is in harmony with the various elements or objectives of the Land Use Plan for Warrick County.
3. The USE will not be a nuisance or serious hazard to vehicles, pedestrians, or residents.
4. The USE as developed will not adversely affect the surrounding area.
5. Adequate and appropriate facilities will be provided for proper operation of the USE.
6. The specific site is appropriate for the USE.

And the Application be approved in accordance to the application and plans on file, subject to the following conditions:

1. Subject to any required Improvement Location Permit being obtained
2. Subject to any required Building permits being obtained.
3. Subject to the Special Use not being altered to become any other use nor expanded than that which was approved by the Board of Zoning Appeals.
4. Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
5. Subject to all public utility easements and facilities in place.
6. Subject to any requirements from the Newburgh Sewer Department.
7. Subject to any required State Highway Permit or bonding.

The motion was seconded by Scott Dowers and present members voted for the motion, therefore the motion carried.

Larry Willis returned to the meeting and took the Chair.

**VARIANCE:**

**BZA-V-11-24**

**APPLICANT and OWNER:** Robert Roebing & Rebecca Stegemoller

**PREMISES:** Property located on the E side of Asbury Cemetery Rd. (W 950) approximately 1450 feet N of the intersection formed by Asbury Cemetery Rd. & Remington Dr. Campbell Twp. Lt 6 in Three Lakes Estates Ph II. 4188 Asbury Cemetery Rd.

**NATURE OF CASE:** Applicant requests a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow an Improvement Location Permit to be issued for a Single Family Dwelling encroaching 20' into the building setback line 15' from the Right of way of Asbury Cemetery Rd. in an "A" Agriculture Zoning District. *Advertised in the Boonville Standard October 13, 2011.*

Robert Roebling, Rebecca Stegemoller and William Bivins, P.E., ACCU Survey, were present.

Mr. Willis called for a staff report.

Mrs. Rector stated they have submitted all of the return receipts from certified mail of notice of this meeting to the adjacent property owners. She stated this is a request for a Variance for a single family dwelling encroaching 20' into the building setback line; 15' from right of way of Asbury Cemetery Road. She stated all surrounding property is zoned "A" Agriculture with sparsely located residences to the east, south and north and there is no flood plain on the property. She stated if approved, they will need a driveway permit off Asbury Cemetery Road. Mrs. Rector stated the applicant states *When viewing this property from Asbury Cemetery Road, prior to purchasing, it appeared that there was ample room to locate both a house and septic system. After purchasing, I found that there was a 50 foot right of way from Asbury Road to the property line. Normally County Road, in rural areas, have a 25 foot right of way but for some reason, Asbury Cemetery Road has a 50 foot right of way on the east side. The Corrected Plat of Three Lakes Subdivision Phase II shows that there is 88.4 feet of building area on the north end from the building line and 55 feet on the south end. From Asbury Cemetery Road this property slopes to the east to a highwall that is approximately 20 feet lower than the road. The top of the highwall then drops into the strip pit lake making this a marginable building site without some relief from the required building set back. According to the attached survey by William Y. Bivins, LS8091003, the highwall is only 99.44 feet from the property line on the north side and only 74.72 feet on the south side. There is a 25 foot building set back line. This leaves only 62+/- feet at the proposed building site not the 88 feet shown on the recorded plat of the subdivision. It has been recommended by Mr. Bivins, who was the Engineer for Ayshire Coal Co. at the time this area was mined, that we stay at least 25 feet from the highwall due to possible damage to the rock structure during blasting of the over burden. There is a Vectren powerline that is 28 feet east and a Chandler waterline that is 40 feet east of the centerline of Asbury Cemetery Road. If this road is ever widened to the east, these utilities will have to be removed at the County's expense. Therefore any future widening would have to take place on the west side of the road. This lot went through the proper channels and was approved as a building site. On paper, it appeared to have ample room for a residence but in reality it does not. I have gone through the expense of getting a new soil test to find a suitable location for the septic system, as show on the plat, but conditions on the ground make it virtually unbuildable without this variance to allow construction within 5 feet of the property line.* Mrs. Rector stated this was the statement by the applicant on the application.

Mrs. Rector stated in 2003 a Variance was granted on Lot 1 in Remington Ridge to allow an unattached accessory building to be located within the 15' building line. She stated this is a corner lot and so there is a 25' building line on Remington Drive and a 15' building line on Asbury Cemetery Road. She stated in

Remington Ridge the right of way for Asbury Cemetery Road is 35' and this unattached accessory building is 5' from the edge of the right of way. She stated Mr. Roebing is proposing his house to be located 5' off the edge of a 50' right of way, which is actually 15' farther back than the accessory building to the south. She added that according to Bobby Howard, County Highway Engineer, he doesn't know why there is a 50 foot right of way on the plat. She said he stated he would only require a 35 foot right of way (from the centerline which would be 70' total). She said that Asbury Cemetery Road is a Rural Minor Collector Road and that is the largest amount of right of way that would be required. She added that Remington Ridge Subdivision lies south of this subdivision and the right of way for Asbury Cemetery Road is 35 feet from the centerline. She stated that William Bivins has stated that the building should stay a minimum of 25 feet from the highwall due to possible instability of the rock due to blasting.

Mrs. Rector stated she spoke to Mark Chamness, the surveyor who prepared both Three Lakes Subdivision and Remington Ridge and he is checking into why he placed the fifty foot right of way on this plat. She said a question she has for Attorney Doll, and they have talked about it is how to correct the plat if it should be just the 35 feet of right of way instead of the 50 feet; if the road right of way would have to be vacated and not done strictly by a replat of the subdivision. She stated she believes they both agreed that it will have to be a vacation of the right of way.

Mrs. Rector stated they have a letter of remonstrance filed by Mike & Lee Schiff that is included in their packets. (copy on file) She asked if they wanted her to read the letter into the record or if they want to read it to themselves. She stated a lot of the letter has to do with private covenants of the subdivision which of course, they don't enforce but she will read it if they want. She stated it is a couple of pages long.

The Chairman stated he thinks they should take a few minutes to read through the letter.

Don Mottley stated there is a paragraph on the second page about the restrictive covenants and asked if they need to ignore that.

Mrs. Rector stated they need to get Attorney Doll's opinion on that but added that they don't enforce them.

Larry Willis asked Mr. Mottley to give everyone a chance to read the letter before he asks any questions.

After several minutes the Chairman stated the letter was read outside of the rebuttal time. He asked the applicants if they have anything to add to the staff report.

Bill Bivins stated one of the concerns she has is about the septic system and Andy Shoulders who is the former Health Officer is going to put the structure in for them and there is no limitation as to where a septic system goes – it is not a structure, it is not classified as a structure so there is no issue with the location of the septic system. He stated the type they are putting in is a relatively new type and it takes less land and will not cause any damage to the lake and that was one of the concerns they had.

Mike Winge asked if that is a mound system.

Mr. Roebing stated it is a Presby System.

Mr. Bivins stated the issue with the...he talked to Bobby Howard after Mrs. Rector. He stated when AMAX replaced Asbury Cemetery Road they had pipes that ran outside the typical 25 foot right of way and that is why they requested a 50 foot right of way but Bobby said it has since been determined by their attorney that the pipes going out didn't cause any problem and it should have been 25 feet on each side at

that time. He stated now it is a Rural Minor Collector Road and they are requesting a 35 foot right of way. He stated the Variance that was allowed down south of here puts the building closer to the road than what they are proposing with this Variance.

Larry Willis asked if that building is within the same subdivision.

Mr. Bivins stated it is in Remington Ridge Subdivision.

Mrs. Rector asked if that is an approved septic site.

Mr. Bivins stated it is. He then stated they are going to pass out some drawings to show where this property is in relationship to where the other Variance has been allowed. (copy of file)

Mrs. Rector asked Attorney Doll to address the question about considering the restrictive covenants while they are looking at this (aerial photo)

Attorney Doll stated the restrictive covenants have no bearing in their decision. He stated they are a private development contract between the subdivision developer and then the purchasers of lots within the subdivision and the applicants, so they can't consider any of the alleged violations or questions of compliance with the restrictive covenants in their deliberation.

Mike Winge asked for clarification on the aerial photo. It was determined the pink highlighted area is where the Schiff's live, the yellow is where the other Variance is and the white box is the subject property.

Mr. Roebeling stated when they are up on the hill they can see 1000 feet in any direction. He stated in the thoroughfare standards they say they can't exceed...if it is rolling hills – there is not much of a rolling hill there - from where the driveway will sit they will be able to see 1000 feet either direction.

Mike Winge stated personally if they have lots they have to understand that people are going to build so that isn't an issue to him. He stated as far as the field bed – all the time that he worked with Aaron (Franz) whether they are back that distance or the neighbor's back they are going to eventually get water migration or whatever so it shouldn't even be an issue if this is an approved field bed with the lake and contamination.

Mr. Roebeling stated the Presby System is a much cleaner system.

Mike Winge stated so the field bed shouldn't even be an issue. He then asked when purchasing the lot was there a discount buying it on the awareness of this.

Mr. Roebeling stated there wasn't, he stated they purchased it according to the plat map that they pulled off the Warrick County GIS.

Mike Winge stated which was misleading.

Mr. Bivins stated the discrepancy is to the top of the high wall and the water; it is hard to determine. He stated the water is a different location than the useable land, which is the top of the highwall and that is where it is hard to understand unless you are out there looking at it and saw where the true corners were.

Mr. Roebeling stated it left him under the assumption that they were purchasing 129 feet on the north end and 85 feet on the south end of the property. He stated Becky and he got out there and starting measuring

and planning and the measurements weren't coming out right and so they hired Mr. Bivins to come out and re-survey the lot. He stated they came out twice and they re-filed a new plat. (drawing)

Mrs. Rector stated Mr. Bivins has certified to the plot plan and the distances. She stated this is an 1800 square foot house with an 1800 square foot basement and three car garage.

Mike Winge stated this is an 1800 square foot basement.

Mr. Bivins stated it is a walk-out basement. He stated that ground slopes.

Larry Willis stated it makes it almost ideal for a walk out.

Mike Winge asked if it will be poured walls.

Mr. Roebling stated it is an ICF (insulated concrete form) home and they will be using 5/8 inch rebar instead of 1/4 or 1/2 inch as well as beefing up the footers. He stated they want that house to stay because this is going to be their retirement home.

Mike Winge stated he is very familiar with ICF and it is extremely good. He stated as the former Building Inspector he would strongly recommend they do that.

Mr. Roebling stated they are trying to save energy too; with an R value of 32 you can't go wrong.

Mr. Winge stated what he is hearing is as far as their preparations on the lot and the way they are going to build and what they are going to put in there, it is way over what code requires. He stated he thinks they are going way further than they need to do.

Mr. Roebling stated he does have a copy of the house plans if they need to see them.

Mike Winge stated there is no need for those but when you dig a basement up there you have to do what he is doing. He then asked if they are doing the gravel footers and sitting the ICF or are they doing poured footers.

Mr. Roebling stated they are going to do whatever it takes to keep the house on the slope.

Mike Winge stated normally it is gravel to set on them for drainage.

Mr. Roebling stated they haven't got their contractor yet. He stated more than likely their contractor will do over and above. He stated if they need to do gravel and then pour concrete over it and rebar down to where it stays that is what they want.

Mike Winge stated the gravel is twofold; it is going to be the drainage ...

Larry Willis commented the distance from the highwall to the 10 foot deck is 28 feet and asked if that is a raised deck.

Mr. Bivins stated it is.

Mr. Willis asked if it is cantilevered out or is it posted.

Mr. Bivins stated it will be posted but they aren't talking about a lot of weight.

Mr. Willis asked if the highwall is almost a sheer wall.

Mr. Bivins stated it is.

Judy Writsel stated this structure is actually going to be further from the highwall edge than the...this one is right on the ... (Remington Ridge property)

Mike Winge stated he is very familiar with that one – it is right on it.

Mrs. Rector stated he was up there several times.

Terry Dayvolt asked if the only Variance they are dealing with the 35 foot to 50 foot setback from Asbury Cemetery Road or are they deviating from the requirements of the subdivision in any way.

Bill Bivins stated the only thing they are varying from is the 25 foot setback which is the Area Plan Commission's requirement and that is why they are asking for the Variance.

Terry Dayvolt stated so in other words he is telling him that all of the questions that were asked by the Schiff's are answered with a yes that they are basically complying with the requirements of the subdivision other than the setback.

Mr. Bivins stated that is correct.

Mrs. Rector stated if the right of way was reduced down to 35 feet then they would only be requesting a 5 foot Variance.

Larry Willis stated what he thinks is the front of the house has a ten foot protrusion out toward the right of way. He asked if that is a porch area or is it living area.

Becky Stegemoller stated that is the garage part that sticks out and then there is a walk in front of the house but the garage actually sticks out ten feet more than the house.

Mr. Roebing went to the Board to explain the drawing. Larry Willis stated there is a ten foot jut out.

Mr. Roebing stated that is a front porch; a covered wrap around porch.

Larry Willis asked if the porch is what is sticking out.

Mr. Roebing stated that is the garage. He showed where the porch wraps around.

Mr. Bivins stated as far as the structure being close to the edge of Asbury Cemetery Road they are not asking for anything other than what has been granted previously.

Don Mottley asked if there were any remonstrators present for the previous Variance.

Mrs. Rector stated she believes there were but it wasn't where it was going to sit they didn't want a garage before a residence.

Ascertaining there were no other comments from the Board, the Chairman called for remonstrators.



Mary Schiff stated she thinks the letter they have that they read to themselves was an email that she sent to Bret (Roebeling).

Larry Willis stated was it dated October 17, 2011.

Mrs. Schiff stated yes and Bret and Rebecca answered that email with a whole lot of information that dealt with a majority of the issues. She stated here is her concern, and it has nothing...she wants them to build there, she agrees with them, the house that they proposed sounds wonderful; the way they are going to build it sounds wonderful. She stated the reference to the Variance that Chris Meyers got concerns her greatly because they are dealing with Three Lakes Subdivision and he is in Remington Ridge. She stated they didn't live out there when he got his Variance and she doesn't know if there were remonstrators when he got his Variances, she was told there were, actually she was told there were not and she was told he got a number of Variances to build the structure that he built there. Mrs. Schiff stated she can tell them that if she was in that subdivision she would have remonstrated because it doesn't fit with the subdivision. She stated she doesn't want that to happen in their subdivision and she doesn't want a twenty foot Variance to be given and then the next person in the next lot want a 20 foot Variance and then the next person in the lots that go on Boonville New Harmony Road, which when that lot was subdivision they had a big conversation with this Board about the natural water flow and how will they ever be able to build a house on there. Mrs. Schiff stated the questions were that is not what they were dealing with it was all they were dealing with was could it be subdivided.

Mrs. Schiff stated if they want to make the right of way 35 feet, which means they would only need a five foot Variance, if they even need that, then there could be no Variance needed. She stated they could do what they need to do without getting a Variance which is what she would like to see. She stated if they are going to say they only want a 35 foot right of way or a 30 foot right of way that moves their property line up 20 feet which means they don't need a Variance at all which means they don't have a record of a Variance on file for the next person to come and say well you gave it to him. She stated Mr. Doll, she thinks in two or three meetings ago in August when Force Design was asking for a Variance, went through specifically what is needed to get a Variance and she doesn't see that any of those criteria are present here. She stated she doesn't think a Variance can just be given because someone asks for one and again she thinks what they want to do can be done without getting a Variance.

Mike Winge stated on the Variance that is moving is going to move the house closer to the road, which if the Variance is given will make her happier.

Mrs. Schiff stated no, he would keep his house right where it is.

Mrs. Rector stated what she is saying is the house won't move they just need to vacate 15 feet of the right of way.

Mrs. Schiff stated he would be within the setback and he wouldn't need a Variance and so there wouldn't be a record of a Variance for the next person to come in and say they "want a Variance, and they want this Variance now and by the way they gave it to him".

Mike Winge stated Variances have been granted for many different issues but the purpose of a Variance is to try to accommodate everybody and you are going to run into things where they design pieces of property and how property is used and in listening here tonight and this is just his opinion as one of the Board members, is they have not only researched in depth and been out more money with Mr. Bivins. He stated as a former building inspector (he feels) they have gone way over board with what they are going to put in the ground and everything else with this home. He stated he thinks they have spent a tremendous amount of money here that they would not have to do which would be a far less house that she would

have to look at. He stated what he sees here being proposed is going overboard for the surrounding neighbors.

Larry Willis stated there is a twenty minute time limit.

Mary Schiff stated again, she doesn't have an issue with the house; she is having an issue with the granting of a Variance for reasons that are not cited in the Statute because they want to grant it and she doesn't think they can do it. She stated she thinks they can do what they need to do without having that granted.

Attorney Doll asked if he could ask a series of questions and see if he understands a little bit. He first stated he agrees with her about the right of way in a sense he wishes it were vacated by the Commissioners but that would take an application to do that and it would take unanimity from the members who own the property in this particular subdivision to file an application like that to vacate that right of way. He stated he doesn't know if that is obtainable or not and so when they are talking about once, that poses a correct step that might be very difficult to ascertain. He stated it looks like the applicants property is the narrowest lot of non-water that exists in this subdivision. He stated between the applicant's lot and this outbuilding down the road in Remington Ridge, there is another lot but it looks to him like there is a house on the far side of the lake over by her. He asked if that is accurate.

Mrs. Schiff stated that lot is owned by Karrie and Ryan Snyder and they have the point which is by her.

Mr. Doll asked if they also own that strip of land between the applicants and this out building in Remington Ridge that is also on Asbury Cemetery Road.

Mrs. Schiff answered yes.

Attorney Doll said it is correct that their land – it looks to be narrower from the aerial he has and even less likely that it could be built upon than the applicant's land.

Mrs. Schiff stated she hasn't researched that. She stated she did research the applicant's when they seriously looked at buying that piece of property.

Mr. Doll stated what is interesting to him is that according to the aerial photograph it looks like their lot has a narrower Asbury Cemetery Road right of way than the applicant's lot. He stated their lot juts out to the highway. He stated he doesn't know if Mr. Bivins knows anything about that or not.

Mr. Bivins stated he isn't sure and asked if it was part of Remington Ridge.

Attorney Doll said so the neighbors to Mrs. Schiff's lot aren't in the Three Lakes Subdivision.

Mrs. Schiff stated it is in Remington Ridge not Three Lakes.

Mr. Bivins stated it is sectional property.

Mr. Doll stated he is trying to understand the Variance argument, the opposition to the Variance within Three Lakes. He stated it looks to him from the aerial and tell him if he is wrong, that the applicant's property and the lot adjacent to it (north) and the one that goes to the corner of Asbury Cemetery and Boonville New Harmony Road, do they all have highwalls.

Mrs. Schiff stated yes; and she has a highwall.

Attorney Doll stated so they all have this common attribute or defect depends upon your point of view.

Mrs. Schiff stated there is nothing unique about it.

Attorney Doll stated so everyone in this neighborhood has that common issue with their property.

Mrs. Schiff answered yes.

Attorney Doll stated the property in this Three Lakes Subdivision is designed to be strictly residential.

Mrs. Schiff answered yes.

Attorney Doll stated the fact that the highwall was there pre-existed everybody's ownership and building out there and was a remnant of the former coal mine.

Mrs. Schiff answered yes.

Attorney Doll stated the only purpose of this Variance is to fit a house on this sliver of ground that is sort of between the devil and damned. He stated it is between the County Highway right of way on one side and the highwall on the other.

Mrs. Schiff said sure, you mean the lake edge.

Attorney Doll stated actually he means the highwall because the lake edge actually means the edge of the water which there has been prior testimony that the water is actually 20 feet or so from the highwall edge. He stated his question is in looking at Article 26 Section 2 which sets forth the requirements for a Variance, each one of those is exactly what a Variance has to prove and in fact he isn't a big fan of Variances but he thinks this Variance hits the nail on the head. Attorney Doll asked her to explain why she thinks it does not.

Mrs. Schiff stated because there is nothing unique about this property that is not consistent with every other property in this subdivision. She said if you would take a ...to follow up with his logic and answer the question, you could build closer to the highwall which would cost more because you would have to put in a different kind of foundation, you could build a smaller house and then you wouldn't need the space of a Variance.

Attorney Doll quoted Article XXVI Section 2 Subsection 2 of the Comprehensive Zoning Ordinance *That the circumstances which cause the HARSHIP must be peculiar to the property in question, or to such a small number of properties that they clearly constitute marked exceptions to the property in the neighborhood. If the circumstances cited as a basis for applying for the Variance are common to the property in the neighborhood the VARIANCE shall be granted.* He said he doesn't know what is more common to this particular property and this particular subdivision than a highwall where the property is pinned against a road right of way and a highwall. He stated every single one of these (lots) with the exception of hers and the other property on her side of the lake is this contorted strip of land that is dealing with the highway right of way on one side and the highwall on another. He stated isn't that exactly what the statute compels them to grant. He said it isn't maybe granted it is shall be granted.

Mrs. Schiff asked which ordinance he is in.

Mr. Doll stated the Comprehensive Zoning Ordinance on page 129. He said based on these exhibits that are part of the application and their dialog, it looks like each of these properties with the exception of hers and the other neighbor; although she has a highwall too. He stated these other properties are all slivers of land that are crowded in between a highwall and the right of way and they are sort of contorted shapes that might be beautiful to live on if you could figure out how to build there but it's not very easy to build there so isn't this a text book case of Variance under this ordinance.

Mrs. Schiff said she would say no because the highwall ...the reason for the Variance as she understands it, is because to move the house closer to the lake would cost more money. She stated it is not something that is unique to the property; every property has the highwall they have to deal with and everyone has to deal with the foundation issue out there. She stated so to grant a Variance you are just granting...it is not unique to the property.

Attorney Doll said the ordinance states that the purpose is to consider an application for a Variance to relieve a problem that would impair the owner's right to some reasonable use of their property.

Mrs. Schiff stated that is right.

Attorney Doll stated he has cited to her the section that says if the circumstances cited for the basis for applying for the Variance is common to the property in the neighborhood the Variance shall be granted. He stated subsection 3 says that a *Variance is required in order to preserve a substantial property right of the petitioner. It is of no moment whatever that the denial of the Variance might deny to the property owner some opportunity to use his property in a more profitable way or to sell it at a greater profit than is possible under the terms of the Article. The owner is entitled only to a reasonable use of his property* and subsection 4 and 5 *That any alleged hardship is not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of this Article. That the regulations to which the Variance is sought shall be modified as little as possible so that the substantial intent and purpose of the regulations shall be preserved. The granting of the variance should be made subject to such conditions as will constitute to this end.* He said in conjunction if you read them all together he doesn't see where there is a clause in the ordinance that says wait a minute, you can't get a Variance if there is some modification that might cost a lot of money but that could in fact allow you to build a structure some other way on this land that wouldn't necessitate the Variance. He stated he doesn't know how expensive a different type of foundation would be to be next to a highwall. He then asked how high the highwall is.

Mr. Bivins stated the hole that was dug there was over 120 feet deep.

Mr. Doll stated so the water covers some of the depth covered and then the rest is just space. He said he doesn't understand where in the ordinance it requires them to require someone to prove they cannot do it some other way at greater expense or else deny the Variance.

Mrs. Schiff stated going back to the first one, what is the circumstances that is peculiar to this property that cause the hardship.

Mr. Doll stated he is looking at several lots that are all crowded against highway right of ways that butt up against highwalls.

Mrs. Schiff stated lot four was created – not by the applicant – but was created, self-created by a person having an interest in the property, which was the very issue they discussed when they talked about the subdivision of this property.

Mr. Doll stated so what she wants is for them to punish, by denying the Variance application of someone who bought a lot in a subdivision that she is now alleging is a hardship and should never have been approved.

Mrs. Schiff stated they alleged it when it occurred and at that time asked specifically and said that those that buy those pieces of property should be put on notice. She stated she can bring those minutes.

Attorney Doll stated he isn't saying these folks don't have a claim against the folks who sold them the land for the hardship they are going through.

Mrs. Schiff stated she doesn't understand why they would want to do the Variance route when they have an objection and there is an issue and it can be resolved without needing a Variance.

Attorney Doll stated he doesn't think it can be fully resolved without needing a Variance. He stated even if they vacate the right of way from fifty feet to thirty five feet they are asking for a 20 foot Variance and his math tells him that fifty minus thirty five is fifteen and so they are five feet short.

Mrs. Schiff asked if they have even looked at that five feet difference.

Attorney Doll stated so what they are really saying to them is either abandon the right of way and shrink the house or come back and ask for a five foot Variance after they have abandoned the right of way to thirty five feet.

Mrs. Schiff stated when he says abandon the right of way she thinks the right of way issue is the County's issue.

Attorney Doll stated a petition has to be presented to the Commissioners to lower the right of way from fifty to thirty five which in keeping with these kinds of road ways in the neighborhood.

Larry Willis stated the twenty minute remonstrance time is up.

Attorney Doll stated no and there could be other people and the Supreme Court says everyone gets their voice.

Mrs. Schiff stated her research says...she thinks they only have a thirty five foot right of way. She said she thinks the other fifteen feet is a utility easement and she thinks when Mr. Newmaster built those roads out there, (Mr.) Fehd on the other side wouldn't give him an easement and they didn't want to come before the Board and go through the red tape of getting a utility easement within the right of way so what they did was give a fifteen foot utility easement. She stated a thirty five foot right of way and a fifteen foot utility easement makes the fifty feet which (Mr.) Chamness put. She said so she thinks their property line is up fifteen feet.

Mr. Doll stated the property has been surveyed hasn't it.

Bill Bivins stated Mr. Chamness came up with a fifty foot right of way and that is what it is plotted as and recorded as.

Attorney Doll stated he would then advise the Board that based on the evidence before them it is a fifty foot highway right of way.

Mrs. Schiff stated the question that someone asked was about the Karrie and Ryan's property and why there is only a thirty five foot right of way there; why theirs goes much farther than Bret and Rebecca's – that is why because the right of way is correct there.

Attorney Doll stated that is a different subdivision and they don't know why it is the way it is but it is. He stated his question still gets to be if they vacate the right of way back down to thirty five feet they still have a five foot problem don't they and so that doesn't fix the problem and so they have to get a Variance application at some point in time; the question is – is it a twenty foot Variance or a five foot application.

Mrs. Rector stated and the house doesn't move.

Attorney Doll stated the house never moves its design location; they are dealing with the technicalities of the ordinance about whether they need a Variance of twenty feet or a Variance of five feet with the vacation of the excess right of way.

Mike Winge stated it seems to him they are dragging these people around this way and that.

Attorney Doll stated this is important stuff because it impacts property rights and future ability to sell things etc. and they have to make sure they get this right for everybody's concern.

Mike Winge stated the small building in the other subdivision set a precedence to which Attorney Doll stated it is irrelevant; there are unique facts and circumstances to each individual land and that is a different subdivision and has no bearing on this application at all.

Mrs. Rector stated by looking at the aerial photo the property directly south of this property is not in a subdivision.

Attorney Doll stated that is why perhaps it comes out further to the road.

Mrs. Rector explained which lot has the most narrow space and said the property gets wider going north and so there may not be a need for a Variance on any lot except this one.

Don Mottley asked Mr. Bivins if it is his opinion it is unsafe to move the house closer to the highwall.

Mr. Bivins stated yes it would be.

Don Mottley asked if the cost to do that would be more than the house was worth.

Mr. Bivins stated absolutely, in his opinion, yes. He stated the mines use a real powerful explosive and while they intend to blast toward the open pit, it does go back the other way. He stated he had blasting damage complaints from the other directions when he was out there.

Judy Writsel asked if she understands correctly that Mrs. Schiff's concern is that if they allow this Variance somebody else in Three Lakes Subdivision might want a Variance.

Mrs. Schiff stated yes and again to address Mr. Doll focus on (section) 2 that they shall grant it.

Judy Writsel stated the reason she is asking is because she isn't seeing another lot in Three Lakes Subdivision that would be in this situation and would be asking for this kind of a Variance. She stated the lot next to them is a great deal wider.

Mrs. Schiff stated she doesn't think it is a great deal wider.

Mrs. Writsel stated from the map it looks a great deal wider. She stated she can't imagine them running into this kind of problem because their strip of land is nowhere as narrow as this one.

Mrs. Schiff stated if you go up around the corner toward Boonville New Harmony Road those three lots will be. She stated they would have to have a Variance or they will have to spend a tremendous amount of money to build a foundation over a natural waterway that feeds into the lake. She stated if they just look at the map it is deceiving. She again said she thinks it can be done without the Variance and she doesn't think it meets the statutory requirements.

Larry Willis stated they only take one property in the process they don't look at the whole subdivision in determining what may or may not happen in the future.

Mrs. Schiff stated she understands that but one of the arguments was "look at what they did right down the street".

Larry Willis stated that is a different subdivision and has no bearing on this decision tonight.

Mrs. Schiff stated she understands that but the concern is that...she said all she can say is she doesn't think it meets the statutory reasons for the Variance and she doesn't think it is unique to this property and it certainly isn't unique to the other property in the neighborhood. She said she thinks it can be done correctly with no need for a Variance.

Mike Winge asked Attorney Doll if his professional opinion is this meets the requirements for a Variance. Attorney Doll stated it is a factual determination; it is not necessarily just a legal determination. He stated what they have to find is that there is some unusual shape or size to the applicants property. He stated secondly that the circumstances which cause this hardship are peculiar to this piece of property, for example, is it the most narrow of all the lots in Three Lakes that is bound by one side with a public right of way and on the back side by a highwall. He said if those circumstances are the basis for the application and it's common to property in the neighborhood that this in effect affecting other properties, then the ordinance says the Variance shall be granted.

Kim Melchiors stated there was a comment made there is no other lot that would incur this problem but the one next to it is narrow. She said it is wider than this lot but if someone builds a bigger house on that property they are going to run into the same problem. She stated just because the next lot is wider doesn't mean they aren't going to encounter this problem.

Mike Winge stated they might have to build a smaller house.

Ms. Melchiors stated that is just it and that is where these Variances...

Larry Willis stated he understands but until they know who is going to build what where they can't...

Ms. Melchiors stated she knows she was just making the comment because it was "well this lot is bigger and they aren't going to have an issue" and they could.

Don Mottley stated he asked Mr. Bivins two specific questions about the safety and the cost and asked Attorney Doll if he would be considered an expert in this case before the Board.

Attorney Doll stated Mr. Bivins is an engineer and he has done the survey work and the Court of Appeals has held that mere opinion about scientific issues are not the correct basis for the Board of Zoning Appeals or the Plan Commission to make a decision, it has to be based upon somebody who has training, expertise or experience in the subject matter they are expressing their opinion on. He stated he and Mrs. Schiff could give legal opinions because they are experts and trained in that regard but when it comes to scientific information he can't express an opinion they can rely upon whereas, Mr. Bivins could if it dealt with engineering or survey. He stated the Supreme Court or Court of Appeals both have held that an opinion without proper training or certification to support it is not sufficient to base their ruling on.

Mrs. Schiff stated (Terry Dayvolt) had asked a question does this go against any of the private restrictions or covenants. She said if the plat is not corrected as she has suggested and the property line stays were it is then it does because in the private restrictions there is a twenty foot setback building restriction, so ... Attorney Doll stated this Board has no jurisdiction over covenants.

Mrs. Schiff stated she understands but he had asked a question and she was answering.

Attorney Doll stated in reality that can't be considered by the Board, otherwise they will be in every neighborhood dispute. He stated the State Statute doesn't give them jurisdiction but there is a private right of enforcement.

Ascertaining there were no other remonstrators present the Chairman called for rebuttal.

Mr. Roebling stated that lake does have a natural drain that goes into it but it is far north of this property. He said there are trees on his lot now that will add to for security from soil erosion into the water and their home falling off into the highwall. He said if the County does go in and vacate that right of way that will cost County money or if he has to do it then it will cost him time and money.

Larry Willis asked what kind of trees are there and if there is a stable root system.

Mr. Roebling stated that he is a master gardener and those trees are newborn all the way up to ten years old. He stated they are honey locust; there are a few oak trees and they plan on planting more trees to block the neighbors view and not make their house the center point of attention on that lake to make it more pleasant and attractive for people that are on that lake, enjoying the lake, they don't need to be looking in our back window.

Mr. Willis and Roebling again discussed the age and type of trees on the property.

The Chairman asked for any more questions from the Board to the applicant.

Mr. Roebling submitted photographs to the Board which demonstrates the trees on the property. (copies on file) He stated they will remain for privacy and possibly even for safety; that is why they are asking for this Variance. He stated further that the stake shown in the pictures will be where the basement walks out to and where the overhang will be.



The Chairman asked if there were any more questions by the Board Members, being none he asked for a motion.

Mike Winge made a motion to approve the Variance Application based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.
3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a marked exception to the property in the neighborhood. Such condition is limited space, an unusual shape or size, particularly to this property between the right of way and the highwall but properties in this neighborhood have similar circumstances.
4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practical difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.
5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
10. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:

- a) Subject to an Improvement Location Permit being obtained.
- b) Subject to any required Building Permit from the Warrick County Building Department being obtained.
- c) Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
- d) Subject to all utility easement and facilities in place.

The motion was seconded by Judy Writsel and unanimously carried.

**BZA-V-11-25**

**APPLICANT and OWNER:** Ted Brown Quality Paint & Body by Ted Brown, Owner

**PREMISES:** Property located on the E side of Epworth Rd. (W 1050) approximately 1240 feet N of the intersection formed by Epworth Rd and Oak Grove Rd. (S 300). Ohio Twp. *2744 Epworth Rd.*

**NATURE OF CASE:** Applicant requests a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow an Improvement Location Permit to be issued for a 2520 square foot unattached accessory building exceeding the maximum allowed rear yard coverage of 1106 square feet in an “A” Agriculture Zoning District. *Advertised in the Boonville Standard October 13, 2011.*

Ted Brown, owner, was present.

Mrs. Rector stated that we have all the return receipts from certified mail. She stated they are seeking a Variance as stated by the Chairman. She stated that all the buildings located on this property is being rented by Mr. Browns nephew. She said that the property to the north is also owned by Mr. Brown and is zoned “M-1” Light Industrial and that he lives on that property and his business is also located there. She continued that the property to the south and east is zoned agricultural which is farm fields and to the west is M-1 Light Industrial and agricultural farm field. She said that the property is located within the 500 year flood plain and nothing is required to obtain permit. The Director stated that he has an existing driveway off of Epworth Road. She stated that the applicants states on the application that he wants permission for the Variance for storage of personal property, truck, camper and classic cars. Due to the property being taken by the widening of Epworth Road he lost approximately sixty (60) feet of frontage or 9000 square feet of the lot; however prior to the additional right of way being purchased the largest accessory building that would have been allowed in 1634 square feet, so a Variance would still be required.

The Chairman asked Mr. Brown if he has anything to add to the Directors report to which he said no; that it pretty much summed it up.

The Chairman called for questions by the Board.

Attorney Doll asked if you can have a residence in a “M-1” to which she explained that you used to could have one as a “care takers” residence; however it is not allowed in the new Ordinance.

Attorney Doll asked Mr. Brown how long his residence has been on the adjacent property.

Mr. Brown stated that the home is where the body shop is.

Attorney Doll asked how old his home is.

Mr. Brown stated it was built in the early 1900's.

Attorney Doll then stated that it would be a pre-existing non-conforming use which Mrs. Rector agreed and stated that he rezoned his property some years ago, seven years ago.

Attorney Doll stated that unfortunately they just spent an hour dealing with what the laws of a Variance is and the same laws that applied to the last application has to apply to this application. He stated so the questions has to be is there something unusual about size shape or location of this property and does this cause a hardship peculiar to this property; does this effect more properties in the neighborhood such that they have to approve this. He continues does this in fact preserve the property right of the petitioner or does it give an opportunity to use the property in a more profitable way or to sell it for a greater price at a later time. He asked is this hardship self-created or not and has the modification being the least possible deviation from the county's ordinance. He stated this is the standard in which you have to apply.

Larry Willis stated that some of the ground was taken by the widening of the road so that would create some.....to which Attorney Doll injected that if the ground hadn't been taken would the 2520 square foot building had been allowed.

Mr. Willis stated he believes it would be a 1600 + building and it wouldn't have been allowed as big as what he is asking.

Attorney Doll stated so if no ground had been taken then he could have built a 1634 square foot building but a Variance of some sort would still be required because it covers more than the permitted area of the rear yard.

Mrs. Rector stated that is 30%.

Larry Willis asked in what zoning to which Mrs. Rector stated this is Agriculture zoning.

Discussion ensued over his personal house being on the "M-1" zoning and there also being a house on the Agriculture zoning.

Attorney Doll stated the question is can a Variance ever grant what couldn't have been acquired to begin with; a building of roughly 900 square feet more.

Mrs. Rector stated he could build as big of a building he wants on the "M-1" zoning.

Mr. Brown stated there is no room to build anything on the "M-1" property.

Terry Dayvolt commented this could be rezoned to commercial right where it is because it is all going to end up commercial there and it is only going to make it more valuable as commercial instead of Agriculture. He stated the building would be more valuable too and asked if there is some reason why he doesn't want it zoned commercial.

Mr. Brown stated time is the issue. He said he is trying to get it done before winter to put his camper and truck in it and it all for his personal stuff. He stated it isn't going to be a commercial building; he isn't saying it couldn't be someday because he is going to build it with footers.

Mr. Dayvolt stated he would think with the ongoing business he has there now, and he passes it every day and it is a very nice building and a very good looking business there, he would think that it would be advantageous to zone it commercial.

Mr. Brown stated he just bought this property two years ago and at that time before he bought it he came up and talked to the office and asked if he bought it did they think he could build this building. He stated they said with a Variance you possibly could with the additional right of way taken. He stated he researched it there to see if he could get this done and they really didn't think it would be a problem. He stated he doesn't really have a problem against doing it commercial it is just....

Terry Dayvolt asked if he knows where the septic is on this property to which Mr. Brown stated he does. Mr. Dayvolt asked if that is why he wants to build the building in an "L" shape in the back.

Mr. Brown stated the "L" shape is what he has to have to get the camper in because it is 55 feet long. He stated the other side is for two classic cars. He stated the building is away from the septic.

Don Mottley asked how many acres he has.

Mr. Brown stated the lot where the building is going is ½ acre. He stated the body shop side is an acre. He said he has tried to buy property behind him but they don't want to sell just ½ acre. He stated he is pretty much landlocked where he is without putting it there. He stated that is the only choice he has.

Ascertaining there were no other questions from the Board, the Chairman called for remonstrators. Being no remonstrators present he called for comments from the Board.

Mike Winge asked Attorney Doll his opinion.

Attorney Doll stated the ordinance is the same for every Variance that comes before them and they have to apply it uniformly. He stated in order to approve a Variance the ordinance says there has to be something unique about the size, shape or location of the property and they can argue in this case he has lost some property and that might be unique to that. He stated if those circumstances constitute a hardship which is peculiar to this property but exists in this neighborhood and those circumstances were not the applicant's own creation and he isn't doing this for an opportunity to use his property more profitable or someday sell it for a greater profit...he is sympathetic but the problem he has is he doesn't know how they can approve a 2520 square foot building when if no property had ever been lost you could only build a 1634 square foot building.

Mike Winge stated the question he has is would it be of any use to him if he can't build the size he wants.

Attorney Doll stated well it would be about enough to put the camper in but not enough for the rest.

Mrs. Rector stated Mr. Dayvolt was talking about rezoning and yes a residence is allowed in a commercial zoning, however you have to meet the setback and standards of residential zoning so that creates another problem. She stated he can't have a garage as big as he wants because it would be an accessory to the house and still have to meet the residential yard requirements.

Attorney Doll asked Mr. Brown if the house on this piece of property is something he would consider doing away with.

Mr. Brown stated it isn't much on size but his nephew lives there and he works for him.

Attorney Doll asked if it was more valuable to him than the ability to build a bigger garage.

Mr. Brown stated he didn't buy the land for the house.

Attorney Doll stated that would fix the problem; if the property was rezoned to either commercial or industrial and the house was removed he could build any size building he wanted.

Mrs. Rector stated or changes the house to an office, no longer a residence.

Mike Winge suggested there could be living quarters there.

Mrs. Rector stated not any longer per the industrial zoning ordinance.

Attorney Doll stated he doesn't know how valuable that house is to him but it seems to him that the testimony was he bought this property because it was beside him and he wanted the land and someday wanted to build a garage there. He said they can help him do this but it seems to him what he has to do is rezone the property, get rid of the residence (tear down or call an office) and if he rezones it commercial or industrial he almost build on the whole lot. He stated otherwise he doesn't see how this Board can grant him a Variance for anything more than 1634 square feet and not get in trouble with a courtroom someday. He stated they get told every day, "you did it before why don't you do it again" and that gets them in trouble when they bend the rules.

Mr. Brown stated no one around him is complaining about it.

Larry Willis stated Mrs. Schiff earlier this evening was trying to stop precedence and she was referencing something that had previously happened.

Mr. Brown said he was talking about the notices he sent out.

Mike Winge stated the thing is someone else buys some property and then they have precedence for what he did.

Mr. Brown stated so without rezoning it now so he can get it built by winter...is there nothing he can do.

Attorney Doll stated he could apply for a Variance for the 1634 square foot. He stated he could build his building in phases and get his camper in. He then discussed the possible sizes and locations. He then said then he could rezone the property and either tear down the house or turn it into an office and then build the rest of the building.

Mr. Brown said someone is living there.

Attorney Doll stated he can't have it both ways. He said it can be an office but they can't live there or it can be a house and not build a big building.

Mrs. Rector asked what kind of entrance the County approved for that property when they put the entrance in when they widened the road. She asked if it was a commercial or residential entrance.

Mr. Brown asked if she means the body shop.

Mrs. Rector stated no this piece of property. She stated they look the same in the aerial photo.

Mr. Brown stated he is sure is residential.

Attorney Doll stated so if he did rezone he would have to put a new entrance in.

Mrs. Rector stated she would have to ask the County Engineer because he might be able to certify for the use but he may have to upgrade the driveway to commercial.

Mr. Brown stated that is why he wants to keep it for his personal use.

Attorney Doll stated then he is limited to the size of the building.

Discussion ensued over the square footage allowed and size building that could be allowed. It was discussed there would be a justification for a Variance for a 1634 square foot building.

Attorney Doll asked Mr. Brown if he would like a 1634 square foot Variance or not do anything and withdraw his application or continue this and think about rezoning.

Mr. Brown stated he doesn't want to tear the house down right now and he wants to get the building up for the camper.

Attorney Doll said so rezoning is out for now and again asked if he wants a 1634 square foot building instead of the 2520.

Mr. Brown asked if he still needed a Variance for the 1634 square feet building to which he was told he did because that size building would not be in compliance with the amount of property is now owns; it would have been the size building allowed on the property before the additional right of way was taken.

Attorney Doll stated he thinks the Board is sympathetic to the issue and is trying to be cooperative.

Mr. Brown stated he has a camper and two classic cars he needs to store so he guesses he will have to put them somewhere else.

Attorney Doll again asked if he wants the 1634 square foot Variance.

Mr. Brown stated he would like that.

Larry Willis asked if he wants to amend his application does the Board need to vote to allow the amendment.

Attorney Doll stated they would vote on the application as changed. He then explained to Mr. Brown that he applied for a Variance to allow a 2520 square foot building and he isn't trying to put words in his mouth; is it his request of the Board tonight to amend his application for this Variance down to a 1634 square foot building.

Mr. Brown answered yes.

Larry Willis stated the motion and vote will be as amended. He called for a motion.

Mike Winge made motion to approve the Variance Application as amended based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.
3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a marked exception to the property in the neighborhood. Such condition is the loss of land due to the Epworth Road improvements.
4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practical difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.
5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
10. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:
  - a.) Subject to Improvement Location Permit being obtained.
  - b.) Subject to any required Building Permit from the Warrick County Building Department being obtained.
  - c.) Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
  - d.) Subject to all utility easements and facilities in place.
  - e.) Subject to a structure not larger than 1634 square feet being constructed upon this property.

The motion was seconded by Scott Dowers and unanimously carried.

Mrs. Rector informed Mr. Brown he would need to come in and amend his plot plan before he can get his approval and permits.

**BZA-V-11-26**

**APPLICANT and OWNER:** Orteza Ayala, LLC by Melvin Orteza, Owner

**PREMISES:** Property located on the N side of High Pointe Dr. approximately 100 feet E of the intersection formed by High Pointe Dr. and Bell Rd. Ohio Twp. Lt 40 in High Pointe Centre North Sec 2 Ph 2 Subdivision. 8480 High Pointe Dr.

**NATURE OF CASE:** Applicant requests a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow an Improvement Location Permit to be issued for a 1874 square foot addition (180 square foot storage building and 1694 square foot wood deck) to an existing covered patio and restaurant further encroaching a maximum of 37.11 feet into the Lake Maintenance & Storm Drainage Easement and encroaching 9.94 feet in to the 42' drainage easement in a "C-4" General Commercial Zoning District. *Advertised in the Boonville Standard October 13, 2011.*

Melvin Orteza and Jim Morley, Jr. Morley and Associates were present.

The Chairman called for a staff report.

Mrs. Rector stated they have submitted all of the return receipts from certified mail of notice of this meeting to the adjacent property owners. She explained this is a request for a Variance to allow an 1874 square foot addition to an existing covered patio and restaurant further encroaching a maximum of 37.11 feet into the Lake Maintenance & Storm Drainage Easement and 9.94' into the 42' drainage easement. She stated a Variance was approved in 2008 to allow the existing 16'X60' covered patio. She added on that approval one of the conditions was there was to be no ingress/egress from the patio except through the restaurant and this plot plan shows a walkway to the dock and patio. She stated they need to explain if there will be access to the patio via the walkway. Mrs. Rector stated the property to the east, south and west is zoned "C-4" General Commercial being High Pointe Centre Sub and Bellmore Sub (west) and the property to the north is zoned Agriculture with a residence. She stated there is no flood plain on the property and it has an existing entrance off High Pointe Drive. She said the addition of 1874 square feet would require an additional 10 parking spaces. She said the original permit showed 64 parking spaces which was 34 more than required so no additional parking spaces will be required. Mrs. Rector added they do lease an overflow parking lot from Maken Corporation property across High Pointe Drive that holds 19 parking spaces. She added they appeared before the Drainage Board on October 10, 2011 and received approval for the addition with the condition they enter into a hold harmless and they have prepared a hold harmless and it is in your packets and it has been approved by Attorney Doll and Attorney Long. She stated he has submitted the original, signed hold harmless to be recorded and the application is in order.

Jim Morley stated the Acapulco Restaurant is booming and they need more space for people to sit. He stated with more meals being served it gives them the opportunity to hire more people and so it is good



for the economy. He stated as they see on the site plan there are two walkways that are shown and by building code you have to have exits off the patio that do not go through the restaurant in case of a fire.

Larry Willis said so they are exits in case of emergency not an entrance.

Mr. Morley stated that is correct, people will come through the restaurant to be seated. He stated the walkway behind the restaurant in the drainage easement is one of those exits and all of the construction will be on dry land; it will be set on posts but it does not go out over the water. He added the Hold Harmless has been executed as requested and this is a great opportunity to see a successful business expand.

Mrs. Rector stated the dock that is on the plot plan has already been constructed.

Mr. Morley stated it has been. He added Mr. Ortiz did not know that he needed to do a permit for the dock and there is also an existing yard barn behind the building and so they have included that in this as well to clean up that up and bring everything into compliance.

Larry Willis called for questions from the Board.

Don Mottley asked if the walkway going toward the dock will be at such a slope that it wouldn't be handicap accessible.

Mr. Morley stated when he spoke with the contractor he said the slope going down the walkway would not be a severe slope. He stated he asked if it would be ADA accessible and he said he didn't remember but it was not a severe slope.

Mike Winge stated that will probably have to meet the requirements for the handicapped.

Mr. Morley stated he knows the one in the back will because it is flat all the way out.

Mike Winge stated if it is sloped it will have to meet the requirements.

Attorney Doll stated the County ordinance says a Variance shall not be granted unless in the first place there is such peculiar circumstance so tell the Board the factual basis. He said Mr. Brown lost part of his yard to the Epworth Road construction; tell them what the peculiar circumstance is for the justification for this Variance.

Mr. Morley stated when this facility was built it was built with a certain number of seats inside it which was all they thought they would need for their business. He said as the business was successful they did an expansion out the first time and the business continued to grow and now they are seeking a second expansion; however, there is no other direction for them to expand. He said the parking lot to the west and south and they can't take parking spaces away from the building as they want to expand. Mr. Morley stated to the north is the drainage ditch and the back of the building and so for lack of better terms, the building is landlocked and this is the only direction they can expand.

Attorney Doll asked how they can get around the fact the ordinance says that is of no moment whatever that the denial of the Variance might deny to the property owner some opportunity to use his property in a more profitable way or to sell it at a greater profit than is possible under the terms of the article; that the

owner is entitled only to a reasonable use of his property. He said his question is maybe this property is full and that is a reasonable use for the size and location of this property as it is. He asked him to tell the Board how they can get around that.

Mr. Morley stated if they look at the site plan this property actually goes to the far side of the lake and so in truth he is using maybe 50% of his property and so he would argue that the property is not full and that this property is zoned commercial for just this type of facility. He said he is excited that it has been so successful and there is an opportunity to hire more people and increase the tax rolls in this economy is a great thing. He said he honestly doesn't think this property is full and here is an opportunity where they are nowhere close to hitting any kind of coverage percentages and still using approximately ½ of the property.

Mike Winge stated the gentleman just before them was told he remove his house or make some choices and they have this recreation basin here...

Larry Willis stated it is a retention basin.

Morrie Doll said they can't move that and it was required by the Drainage Board.

Mike Winge said what he is saying is if this was put here and it was there when he bought the lot and they anticipated their growth, wouldn't they have had some idea of what size space they needed.

Mr. Morley stated originally there was...you always hope your business is successful; however, the success of this location has been better than hoped. He stated he did the original site plan when they got their original building permit and they tried to maximize the parking spaces and the size of the building and at the same time if they remember, this restaurant was at the Apple Center and so it was a smaller restaurant and when they went this big they thought they were going to take care of the demand. He stated they are happy to say it has exceeded that.

Mike Winge asked Attorney Doll since the pond was required by the County, could this not have created a hardship on this property in the same regards as the taking of the right of way earlier.

Attorney Doll stated it is sort of like that in that regard. He said he doesn't think Mr. Ortiz created this hardship; he thinks there is a hardship, he thinks there is a retention basin that is at least 40% of the total space of the lot. He said but paragraph four of the Variance says *the alleged hardship is not self-created by any person having an interest in the property. Nor is the results a mere disregard for or ignorance of the provisions of the article.* He said if Mr. Ortiz had built this basin because he was required to then he would think that is a problem but as he understands the facts and Mr. Morley can concur on the record, the retention pond was built by the developer before Mr. Ortiz purchased the lot.

Mr. Morley stated that is correct; the retention basin was there already.

Mr. Doll stated that is like Mr. Brown and the road previously. He said Mr. Ortiz had no more control over whether there was a retention pond there than Mr. Brown did on the County improving Epworth Road. He said he needs to ask Mr. Morley in his professional opinion as an engineer, does this structure have any impairment factor whatsoever to either the retention pond or the drainage way.

Mr. Morley stated no, they have received Drainage Board approval because these structures sit on posts in the easement it doesn't take up any storage volume out of the retention basin nor the cross sectional flow.

Larry Willis said so if the water wasn't there they could build on it.

Mr. Morley said if the retention pond wasn't there and also Mr. Ortiz is responsible for maintaining that retention basin and the drainage easement.

Attorney Doll stated this lot is landlocked because they have Bell Road on the west side; High Pointe Drive on the south; the drainage easement that you couldn't build through to the north and the detention pond to the east.

Mr. Morley stated they have nowhere else to expand except there.

Attorney Doll said they could go vertically or sub-terrainally and he doesn't think people want to eat in caves.

Terry Dayvolt asked if they are enclosing the patio for the winter.

Mr. Ortiz said no it is summer use only.

Larry Willis reiterated the testimony saying the walkways are exit only from the patio as required by the fire marshal and the patio will be cantilevered or supported by piers over the existing drainage retention pond and if the pond was not there they could add on to the building.

Attorney Doll stated there is one more thing that needs to be on record. He said he understands there is live entertainment on the patio at times and he wants to let them know that that requires a Special Use. He said they have had some complaints, not about this establishment but another one and so if they are going to have music outside in the open air they need to file for a Special Use.

Ascertaining there were no other comments from the Board and being no remonstrators present, the Chairman called for a motion.

Don Mottley made a motion to approve the Variance Application based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.
3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a

marked exception to the property in the neighborhood. Such condition is the retention pond already being developed prior to the purchase of the lot.

4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practically difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.
5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
10. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:
  - a) Subject to an Improvement Location Permit being obtained.
  - b) Subject to any required Building Permit from the Warrick County Building Department being obtained.
  - c) Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
  - d) Subject to all utility easement and facilities in place.
  - e) Subject to a Hold Harmless Agreement being executed and recorded.

The motion was seconded by Judy Writsel and unanimously carried.

**ATTORNEY BUSINESS:**

None

**EXECUTIVE DIRECTOR BUSINESS:**

None

Being no other business the meeting adjourned at 8:10 pm.

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Larry Willis, Chairman

**ATTEST:**

The undersigned Secretary of the Warrick County Area of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of said Board at their monthly meeting held October 24, 2011.

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Sherri Rector, Executive Director & Secretary